IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,
Petitioner,

v.

THE RATH PACKING COMPANY, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR GROCERY MANUFACTURERS OF AMERICA, INC., AS AMICUS CURIAE

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Amicus submits this brief in support of the Respondents. All parties have consented to its filing by a letter that has been presented to the Clerk of the Court in accordance with Rule 42(2).

INTEREST OF AMICUS

The Grocery Manufacturers of America, Inc., is a trade association representing companies that manufacture food products for nationwide distribution. Its members include the principal grocery manufacturers

in this country. Members of the association ship food in interstate commerce for sale throughout the country and are subjected to numerous different labeling requirements imposed by various jurisdictions, including the requirements at issue in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the preemptive effects of three federal statutes—the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*; the Fair Packaging and Labeling Act, 15 U.S.C. § 1451 *et seq.*; and the Federal Meat Inspection Act (as amended by the Wholesome Meat Act), 21 U.S.C. § 601 *et seq.*—on California statutes and regulations governing label declarations of net weight for bacon and flour products.

All aspects of the labeling of foods distributed in interstate commerce—including net weight declarations—are governed by the Federal Food, Drug, and Cosmetic Act and regulations issued under it by the Food and Drug Administration (FDA). In recent years the member companies of the Grocery Manufacturers of America have been confronted with an increasing number of state and local statutes, regulations, and administrative interpretations that impose food labeling requirements different from or in addition to those imposed under federal law. Those requirements often differ from state to state and from locality to locality. Collectively, such state labeling requirements impose substantial barriers to the national distribution of food. Variations in net weight labeling requirements constitute only a single example of the profusion of inconsistent state labeling requirements to which national food distributors are subjected.

This brief addresses the preemptive effect that should be accorded to the Federal Food, Drug, and Cosmetic Act and the FDA regulations. It does not consider the preemptive effect of requirements imposed under the Fair Packaging and Labeling Act and the Wholesome Meat Act; those subjects are dealt with in the brief for the Respondents.

Section 403(e) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(e), requires food labels to bear an "accurate" statement of net weight, but provides for issuance of regulations permitting "reasonable variations." FDA has issued regulations providing for two kinds of variations from stated net weight: unavoidable deviations in good manufacturing practice and deviations resulting from loss or gain of moisture. 21 C.F.R. § 1.8b(q). No other variations are permitted. Manufacturers may not overfill or underfill their products, except within the limits of deviations in good manufacturing practice.

California statutes and regulations governing the accuracy of net weight declarations for foods and other commodities make no allowance for gain or loss of moisture. Flour, like many foods, is a hygroscopic commodity. Its moisture content (and therefore its weight) depends in part on the humidity of the place where it is being measured. To comply with the California law, manufacturers who expect that their flour may lose moisture in the course of distribution are required to compensate for that projected water loss by a corresponding increase in the flour content of the package, and thus to overpack their products to assure full measure at the point of sale.

This requirement of California law conflicts directly with the corresponding requirements for net contents declarations imposed under the Federal Food, Drug, and Cosmetic Act. Manufacturers shipping flour to California in interstate commerce cannot comply with the state regulation, since overpacking at the point of manufacture violates the federal statute. Because it conflicts irreconcilably with the federal statute, the California law is preempted under the Supremacy Clause of the Federal Constitution.[1]

Moreover, the California requirement impermissibly interferes with the purpose of the federal regulatory scheme. An important function of the federal prohibition against intentional overpacking is to permit price comparisons by consumers among competing products. Such comparisons can be made only if the weights of products cluster (within deviations permitted by the federal regulations) around the stated net weight of the package. If manufacturers deliberately overpack to allow for loss of moisture, the extent of overpacking will vary for each product, depending on differences in the moisture content resulting from variations in humidity in the geographical location where the flour is packed and the geographical area in which it is to be marketed. The actual amount of flour in competing packages in retail stores will therefore vary, even though the declared net contents are the same. Since consumers will be unable to determine accurately the amount of flour in any particular package, they will be unable to make accurate price comparisons.

FDA has solved this problem for flour by issuing a standard of identity that sets a maximum moisture con-

[1] U.S. Const., art. VI, cl. 2.

tent of 15 percent for the food at the time it is packed, thus standardizing on a national basis the amount of flour solids that will be received by all consumers in a given package size regardless of where it is bought at retail. 21 C.F.R. § 15.1(a). Any subsequent change in moisture content does not affect the value of the product, since all consumers, wherever located, will receive the same quantity of flour solids. Moreover, since flour is invariably used in combination with water or other liquids, loss of moisture does not affect its quality. The FDA regulatory system fully answers the problem of moisture loss or gain and preserves the federal statutory purpose of permitting value comparisons. The California statute defeats this purpose.

The conflict between California and federal net weight labeling requirements is but one example of the larger problem of state and local food labeling requirements different from or in addition to those imposed by federal law. As applied to foods that are shipped in interstate commerce, those requirements are invalid, since the Federal Food, Drug, and Cosmetic Act and the regulations issued under it preempt different or additional state labeling requirements.

Although the Federal Food, Drug, and Cosmetic Act, which was enacted in 1938, lacks an express preemption provision, its legislative history evidences a continuing congressional concern for the establishment of a uniform national system of food labeling regulation. The modern United States food industry, which distributes its products on a national basis without regard for state boundaries, requires such a labeling system. Numerous authoritative studies conducted by federal investigative commissions, as well as expressions of opinion by the Association of Food and Drug Offi-

cials (the national association of state and local food and drug officials), support a conclusion that state labeling requirements in addition to or different from those imposed under federal law pose serious obstacles to national commerce in food.

The federal government has a preeminent interest in assuring uniformity of food labeling regulations. To accomplish that purpose, Congress and FDA have established a pervasive system of federal regulations of food labeling that leaves no room for supplementation by the states. An important role remains for state regulatory authorities in the enforcement of uniform labeling requirements established under the leadership of the federal government.

ARGUMENT

I. CALIFORNIA NET WEIGHT LABELING REQUIREMENTS DIRECTLY CONFLICT WITH REQUIREMENTS IMPOSED UNDER THE FEDERAL FOOD, DRUG, AND COSMETIC ACT.

Manufacturers shipping flour in interstate commerce for sale in California confront conflicting federal and state labeling requirements. The Federal Food, Drug, and Cosmetic Act requires the label for a food to bear an "accurate statement of the quantity of the contents in terms of weight . . .," but provides that "reasonable variations shall be permitted" by regulations prescribed by the Secretary of Health, Education, and Welfare. 21 U.S.C. § 343(e). The Commissioner of Food and Drugs (to whom authority to administer the Act has been delegated, 21 C.F.R. § 2.120(a)(1)) has promulgated regulations that provide for two types of variations from stated weight: (1) deviations resulting from "loss or gain of moisture during the course of good distribution practice," and (2) "unavoidable deviations in good manufacturing practice." 21 C.F.R.

§ 1.8b(q). With these exceptions, federal law requires that the statement of weight on a label be an accurate statement of the quantity of contents. Neither overfilling nor underfilling is permited (except to the extent that it may result from an "unavoidable deviation" from good manufacturing practice). *Cf. United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82 (1932).

Section 12211 of the California Business and Professions Code, which authorizes inspectors to order misbranded commodities "off sale," provides:

> ". . . the average weight or measure of the packages or containers in a lot of any such commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package . . . ." Calif. Bus. & Prof. Code § 12211 (1976 Supp.).

The implementing regulations are contained in 4 Calif. Admin. Code 8, subch. 2. Petitioner's brief contends that these regulations are based on National Bureau of Standards Handbook No. 67, a manual that weights and measures officials may use in checking the accuracy of quantity declarations for prepackaged commodities of all kinds. Unlike Handbook 67 and the regulations adopted by FDA, however, the California regulations make no allowance for gain or loss of moisture during the course of good distribution practice.[3]

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[3] Handbook 67 makes reference to a model regulation for prepackaged commodities adopted by the National Conference on Weights and Measures. That regulation sets out a statistical sampling procedure that allows for variations in stated net weight resulting from deviations in good manufacturing practice. But it also provides that "variations from the stated weight or measure shall

These state and federal standards irreconcilably conflict. Flour is a hygroscopic commodity. Its moisture level—and therefore its weight—depends in part on the humidity of the place where it is measured. *General Mills, Inc.* v. *Jones,* 530 F.2d 1317, 1320 (9th Cir. 1975). To comply at the retail level with the California standards, millers would be required either to pack flour separately for distribution in California (and other states that may follow suit) or to overpack all their flour packages. Overpacking, however, would be inconsistent with the requirement of federal law that the net quantity statement be "accurate" except insofar as variations are permitted by federal regulations.

In *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142-43 (1963), the Court stated:

> "A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce . . . ." (Citations omitted.)

The divergent standards of federal and state law in this case confront flour distributors with such a physi-

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be permitted when caused by ordinary and customary exposure . . . to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure." The Handbook explains that "[c]ertain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs." It advises weights and measures officials to "learn to compare various environments and various systems of distribution and storage" in order to make proper allowances. *Checking Prepackaged Commodities: A Manual for Weights and Measures Officials* 2 (Nat'l Bureau of Stnds Handbook 67, 1959).

cal impossibility. For this reason, Section 12211 of the California Business and Professions Code and the regulations implementing it are invalid.

II. THE CALIFORNIA LABELING REQUIREMENTS INTERFERE WITH THE PURPOSE OF FEDERAL REGULATIONS.

Under the California regulatory scheme, a miller that distributes its products nationwide must pack its flour to allow for moisture change in distribution. Moisture change will vary, depending on the humidity of the place where the flour is packed and the humidity of the region to which it is shipped for retail sale. If flour is packed in a humid climate (such as northern Washington State) and shipped to a dry region (such as Arizona or, to a lesser extent, southern California), moisture loss may be at least 1 ounce per pound of flour. If flour is packed in a dry climate and shipped to a humid region, moisture gain will be correspondingly large. There are, of course, an infinite number of possible moisture changes resulting from national distribution of flour from various packing plants.

To assure that its products meet requirements like those imposed by California, a national flour distributor must follow either of two alternative packing procedures. First, it may segregate the flour packages that will be shipped to those dry regions where the moisture level can be expected to fall below the national standard of 15 percent promulgated by FDA and include sufficient extra flour in the packages for each of those regions beyond that required to meet the FDA standard in order to meet each of the additional requirements of those regions. Second, it may pack all of its flour to comply with the requirements of the driest region in the nation, with the result that the

great bulk of its flour packages will be substantially overpacked at retail.[3]

The first alternative is economically unfeasible for national flour marketers. Large-scale production and distribution processes can be disrupted for selective overfilling only at prohibitive cost.

The second alternative produces an inconsistency of measure at retail in humid localities between locally and nationally distributed flour products. Since products distributed locally in humid areas need not be overpacked to allow for moisture loss, their packages will contain less flour than those of their nationally distributed competitors. The differences in measure will be significant. Under the national standard promulgated by FDA, 21 C.F.R. § 15.1, flour may contain up to 15 percent moisture by weight. The flour packages at issue in this case contained 13–14 percent moisture at the time they were packed. Moisture loss may account for 5–6 percent or more of the packed weight of flour in dry regions. To assure full stated weight at retail in dry regions, the national miller will be required to overpack by 1 ounce or more per pound. In humid regions, nationally distributed products may therefore contain 1 ounce more flour per pound than locally distributed products.

An important objective of the federal scheme governing net weight labeling is to facilitate price comparisons by consumers. This purpose of FDA's regulatory scheme was explained in the Brief of the United

[3] A third alternative, of course, would be for the national marketers to avoid distributing their flour in dry regions. Such results frequently occur when local jurisdictions impose burdensome labeling requirements on nationally distributed food products that are already labeled in full compliance with federal law.

States as Amicus Curiae in *General Mills, Inc.* v. *Jones,* 530 F.2d 1317 (9th Cir. 1975) at 12. FDA's objective is consistent with the mandate imposed on it by the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1461, which was enacted in part "to promote packaging practices which facilitate price comparisons by consumers." S. Rep. No. 1186, 89th Cong., 2d Sess. 1 (1966). To make price comparisons, consumers must be able to determine the actual net contents of competing products.

FDA has recognized and dealt with the problem of moisture change through the establishment of standards of identity for flour products that set a maximum moisture content of 15 percent at the time the product is packed and labeled. 21 C.F.R. § 15.1(a). A subsequent loss of moisture does not affect the nutritive value of the flour, nor does it affect its usefulness in the home (since flour is invariably used in combination with water, milk, or other liquids). Consumers pay for and receive the same quantity of flour, as defined by the federal standard, even though some part of its moisture content may have evaporated. Since all packages are similarly packed, accurate price comparisons are possible.

The California regulatory requirements defeat the purpose of the FDA regulatory scheme. Consumers in humid areas comparing local and national flour products cannot accurately determine comparative unit prices. The California law thus "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and is invalid. *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941); *Perez* v. *Campbell,* 402 U.S. 637, 649 (1971). *See also Nash* v.

Florida Industrial Commission, 389 U.S. 235, 239 (1967).

The California scheme, moreover, imposes a significant burden on interstate commerce in flour. It places nationally distributed products at a serious disadvantage against locally produced foods in humid areas, since packages of nationally distributed products must contain more flour than locally distributed products whose labels bear the same net weight declarations. *See Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959).[4]

The burdens imposed by the California statute on interstate commerce in flour and on the accomplishment of the purposes of federal law cannot be justified by the need to protect the state's consumers against fraud or deceptive practices. To the extent that variations in net weight result from moisture loss, rather than a reduction in flour solids, consumers lose nothing of value.

The California officials contend, however, that they cannot determine whether moisture loss is in fact the cause of apparent shortages in weight detected at the retail level. They suggest that making allowances for

[4] The discriminatory effect of the California scheme on national flour distributors becomes apparent when one considers the amounts of money that may be involved. Domestic sales of "family flour" and cake flour in 1974 totaled over $513 million. *Supermarketing,* Sept. 1975, at 50. If only half of that total was distributed on a national basis, the cost to national millers of overpacking as little as 5 percent would have been $12.8 million. That cost would either have been reflected in higher prices for nationally distributed flours (which would have placed them at a competitive disadvantage against local millers) or in reduced margins of profit for national distributors.

different rates of moisture loss for foods would pose an insuperable obstacle to effective enforcement of their labeling requirements. In fact, however, at least three methods exist for protecting consumers within the state against actual short-weight packages without defeating the policies of federal law. First, state officials in California may establish cooperative programs with officials in other states to inspect flour and similar foods at the point of packaging to assure that the stated net weight is packed. Second, state officials can determine the moisture content for a commodity offered at retail, compare it with the moisture content permitted under applicable federal standards, and calculate the portion of weight deviation that is accounted for by moisture loss. Finally, the state officials can follow the advice of National Bureau of Standards Handbook 67 (which, according to Petitioner's Brief (at 19), forms the basis for California's enforcement program) and "learn to compare various environments and various systems of distribution and storage" and "develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is 'customary exposure' and what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture." *Checking Prepackaged Commodities: A Handbook for Weights and Measures Officials* 2-3 (Nat'l Bureau of Stnds Handbook 67, 1959). In short, the inspector must do his homework and cannot rely on a rigid statistical procedure that does not reflect the realities of proper nationwide food distribution.

III. THE FEDERAL FOOD, DRUG, AND COSMETIC ACT AND REGULATIONS ISSUED UNDER IT PREEMPT STATE FOOD LABELING REGULATIONS IN ADDITION TO THOSE IMPOSED UNDER FEDERAL LAW.

The legislative history of the Federal Food, Drug, and Cosmetic Act and the nature of modern food distribution and marketing practices evidence a substantial national interest in establishing a uniform system of rules to govern food labeling. That interest has been served by the establishment of a pervasive system of federal regulation which, while permitting concurrent federal-state enforcement, does not leave room for the establishment of different or additional state labeling requirements for foods that are shipped in interstate commerce.

Although the Federal Food, Drug, and Cosmetic Act contains no provision expressly preempting state labeling requirements different from or in addition to those imposed under federal law, the absence of such a provision is not dispositive of the question of preemption. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 772 (1947). Statutes to which this Court has accorded preemptive effect have often not contained such provisions. The Court has made clear that preemptive intent may be inferred from the legislative history of a statute, the need for a uniform system of federal regulation, or the existence of a pervasive system of federal rules that permits no supplementation by the states. *See Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Under the criteria identified by this Court in numerous decisions, preemptive effect should be accorded to the system of labeling regulation established under the Federal Food, Drug, and Cosmetic Act.

A. The National Interest in Uniform Labeling Requirements for Foods Shipped in Interstate Commerce Can Only Be Served by a Single System of Federal Regulation.

The regulation of food labeling comprises two separate functions—the development of rules and policies governing labeling, and the monitoring and enforcement of compliance with those policies. The Grocery Manufacturers of America agrees with Petitioner that state and federal authorities should work cooperatively to perform the monitoring and enforcement function. That function is a legitimate exercise of the state's police power. But the establishment of uniform rules to govern the labeling of foods that are distributed nationally and regionally in interstate commerce is a matter of peculiarly national concern. The regulation of interstate food distribution can only be effectively accomplished under a single national statutory scheme. Imposition of varying requirements by the states frustrates that federal scheme.[5]

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[5] Food regulatory officials perform many functions other than issuance of labeling and compositional requirements and enforcement of compliance with them. Many of these functions can (and should) be performed by state and local authorities. Effective surveillance of sanitation in food manufacturing plants, warehouses, and similar facilities requires the cooperative efforts of state and federal officials; their concurrent regulation of such matters does not undercut the federal interest in efficient national food distribution. Sanitation in food stores and restaurants is a matter of peculiarly local concern. Similarly, state and local officials should bear principal responsibility for devising and enforcing regulations to protect consumers from fraud or deception in the sale of foods (such as some meats, cheeses, and fresh fruits and vegetables) that are not shipped in interstate commerce in prepackaged form but are packaged and weighed at the retail level. *See* Austern, *Federalism in Consumer Protection: Conflict or Coordination?* 29 AFDOUS Quart. Bull. 148 (1965).

This Court has often recognized that federal preemption of state regulation will be implied when the subject matter demands exclusive federal regulation in order to achieve "uniformity vital to federal interests." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 144 (1963); *Campbell* v. *Hussey,* 368 U.S. 297, 300-302 (1961); *San Diego Building Trades Council* v. *Garmon,* 359 U.S 236, 241-244 (1959); *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148, 167-168 (1942).

When Congress enacted the first national food law —the Food and Drugs Act of 1906 (Act of June 30, 1906, ch. 3915, 34 Stat. 768)—it recognized the burdens that inconsistent state requirements could impose on interstate commerce, and sought to encourage the adoption of uniform requirements. The Report of the House Committee on Interstate and Foreign Commerce that accompanied the 1906 Act stated that

> ". . . the laws and regulations of the different States are diverse, confusing, and often contradictory. What one State now requires the adjoining State may forbid. Our food products are not raised principally in the States of their consumption.
>
> "State boundary lines are unknown in our commerce, except by reason of local regulations and laws, such as State pure-food laws. It is desirable, as far as possible, that the commerce between the States be unhindered. . . ." H.R. Rep. No. 2118, 59th Cong., 1st Sess. 5-6 (1906).

The 1906 Act, however, did not establish the basis for a comprehensive federal labeling scheme; it left many aspects of food labeling to the states. *See* pp. 28-29, below.

Between 1906 and 1938, the national system of food manufacturing and marketing changed dramatically, and the change increased the federal interest in uniform regulation. Consumption of fresh foods and unprocessed agricultural products declined, and greater quantities of processed, prepared, or manufactured foods were purchased. Advances in transportation facilities and distribution technology (such as the introduction of refrigerated vehicles) encouraged the growth of large-scale food manufacturing firms that distributed their products on a national basis. *See* Federal Trade Commission, *The Structure of Food Manufacturing* 5 (Nat'l Comm'n on Food Mktg. Tech. Study No. 8, June 1966). Varying or inconsistent state food labeling requirements created increasingly serious barriers to national food distribution. *See, e.g.,* U.S. Dept. of Agriculture, *Barriers to Internal Trade in Farm Products* (1939). When Congress considered enactment of a new national food and drug law in the 1930's it acknowledged the "problem of uniformity" and recognized the need for the "Federal Government to take leadership in modernizing existing law." S. Rep. No. 361, 74th Cong., 1st Sess. 3 (1935). The statute that Congress enacted in 1938 provided the framework for a comprehensive federal system of food labeling regulations.

The problem of varying and inconsistent state regulations has, however, worsened with the passage of time. Unfortunately, inconsistencies in state labeling requirements are as common today as they were in 1938. The National Commission on Food Marketing, established by Congress in 1964[6] to appraise the marketing structure of the industry, concluded that

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[6] Pub. L. 88-354, 88 Stat. 269 (1964).

"The conflicts among the profusion of State regulations bearing on containers, grades, labels, product nomenclature, and the like are a significant burden on interstate trade in food products.

"We therefore believe that a concerted effort should be made to effect uniformity among State regulations that obstruct trade in foods across State lines." Food from Farmer to Consumer: Report of the National Commission on Food Marketing 112 (1966) (emphasis in original).

In 1963, FDA contracted with the Public Administration Service to conduct a study of state and local food and drug programs. The Service's report, published in 1965, concluded:

". . . The general food and drug laws of the states fail to reveal a basic uniformity among themselves or an adequate correspondence with federal legislation. In many instances they do not have the breadth of coverage of products and consumer risks they should possess. Differences in laws and regulations are excessive, and many serve no useful purpose; the total body of state and local food and drug laws is a confusing and disjointed mass." Public Administration Service, *A Study of State and Local Food and Drug Programs* 8 (1965).

In 1969, the President appointed the White House Conference on Food, Nutrition, and Health to study the nation's nutrition problems and consider government policies that would promote the availability of nutritious foods. The Conference studied the problems of developing and distributing nutritious new foods under federal and state regulatory policies. Its Report concluded:

". . . Under present Federal, State and local law. different and often inconsistent regulatory requirements for the sanitation, labeling and marketing of new foods prevail throughout the Nation. These inconsistent and different requirements result in artificial trade barriers that impede the orderly marketing of foods, hinder sound nutrition, raise the cost of new foods to consumers, and directly interfere with the public interest. Other restrictive laws and regulations have hindered the development of new foods regardless of higher nutritional value and lower cost to consumers. Some of these laws also have had the unexpected effect of preventing the adaptation of traditional foods to modern food technology and nutritional needs. This situation cannot be justified on public health grounds, and reflects the lack of any attempt to establish and maintain a national policy on foods that reflects the interests of consumers." *Report of the White House Conference on Food, Nutrition and Health* 124-125 (1969).

Accordingly, that Report recommended, at 117, "Uniform application of all regulatory requirements throughout the Nation, enforceable by Federal, State, and local officials."

This lack of uniformity, and the burden it places on legitimate commerce in foods, has been repeatedly recognized by the Association of Food and Drug Officials (formerly the Association of Food and Drug Officials of the United States), whose membership includes regulatory officials from all of the states. In 1941, for example, the Association's president criticized "trade barriers that force many producers and manufacturers to live under the virtual dictatorship of localized bureaucracy" and urged state food and drug officials to "[d]iscourage the enactment of laws

that make it impossible for legitimate industry of one state to engage in trade in another under conditions which are fair and equitable." 5 AFDOUS Quart. Bull. 2 (1941). That year, the Association's members adopted a resolution expressing "disapproval of the tendency toward the enactment of legislation which constitutes definite barriers to Commerce between the states. . . ." 5 AFDOUS Quart. Bull. 8 (1941). Since 1940, the Association has repeatedly adopted resolutions urging enactment of uniform food and drug legislation. *E.g.*, 4 AFDOUS Quart. Bull. 3–4 (1940); 31 AFDOUS Quart. Bull. 73 (1967); 33 AFDOUS Quart. Bull. 46–47 (1969). Nonetheless, as recently as 1973, the Association's members passed a resolution acknowledging (and disapproving) "a growing trend that . . . some States and local agencies are passing laws, regulations, or ordinances which are inconsistent with the principle of uniformity to which A.F.D.O. U.S. is committed. . . ." 37 AFDOUS Quart. Bull. 19 (1973).[7]

Numerous examples of varying and inconsistent state food labeling requirements may be cited. Perhaps the most serious burdens on national food distri-

[7] The solution that state food and drug officials have regularly urged for the problem of inconsistent state requirements is adoption of uniform state legislation. In fact, a uniform statute, developed by the Association of Food and Drug Officials in cooperation with FDA, has been enacted in many states. It has not, however, solved the problem of inconsistent state requirements. In many states, the uniform act has been adopted in addition to, not in place of, special labeling requirements enacted over the years. Moreover, the broad terms of the uniform act leave state regulatory officials great discretion to impose inconsistent requirements in particular cases, and inconsistent regulatory policies remain quite common. *See* Public Administration Service, *A Study of State and Local Food and Drug Programs* 47-48 (1965).

bution are imposed by conflicts among the states and between the states and the federal government with respect to standards of identity and composition. The Federal Food, Drug, and Cosmetic Act empowers FDA to establish standards of identity that specify the legal names and composition of foods. 21 U.S.C. § 341. An important purpose of these standards is to promote national uniformity and eliminate consumer confusion. Once a food standard is promulgated, all foods that purport to be or are represented as the standardized food must bear the name established by the standard and be formulated in accordance with its requirements. 21 U.S.C. § 343(g). Some states automatically adopt federal standards of identity, but others do not. Many states that adopt federal standards by reference reserve the right to adopt inconsistent standards if their regulatory officials choose to do so. Section 26510 of the California Health and Safety Code states, for example, that ". . . The [California State] department may, by regulation, establish definitions and standards of identity, quality, and fill of container for any food whether or not such definitions and standards are in accordance with the federal regulations, when in its judgment such action will promote honesty and fair dealing in the interest of consumers. . . ." Calif. Health & Safety Code § 26510 (Supp. 1976).

The inconsistencies in labeling requirements that may result from a failure to recognize nationally established standards of identity and other labeling rules are well illustrated by a series of enforcement actions instituted by regulatory officials in New York State last year. In two cases, New York officials sought injunctions against distribution of nationally

marketed foods labeled in conformity with federal standards of identity, arguing that their labeling did not comply with state law. Both cases involved products that were labeled as "table syrup" in accordance with mandatory requirements under 21 C.F.R. § 30.1. New York officials contended that the products should be labeled "imitation maple syrup"—a statement of identity that would violate the requirements of 21 U.S.C. § 343(g), as well as equivalent statutes in states that automatically adopt federal identity standards. *Dyson* v. *Lever Brothers, Inc.,* (N.Y.Sup.Ct., 3d Dept., complaint served December 10, 1975); *Dyson* v. *CPC International, Inc.* (N.Y. Sup. Ct., 3d Dept., complaint served December 10, 1975).

Similar problems arise when states adopt special requirements for particular food products. For example, frozen desserts made from vegetable oil (frequently sold under the name "mellorine") are subject to insuperable interstate trade barriers established by a profusion of inconsistent state regulations. States have adopted widely divergent compositional and labeling requirements for these foods, so that a single product cannot possibly be marketed on a national basis. As of January 1, 1974 (the latest date for which a reliable compilation is available), 35 states prohibited some form of mellorine-type frozen desserts. Twenty-seven states prohibited both "regular-fat" and "low-fat" versions of the product. Six states prohibited low-fat products, but permitted regular-fat ones. One state prohibited regular-fat products, but permitted low-fat ones. For regular-fat mellorine, minimum fat requirements ranged from 6 to 10 percent; minimum milk solids not fat from 10

to 20 percent; maximum stabilizer content from 0.5 to 1 percent; and minimum food solids per gallon from 1.3 to 1.6 pounds. Most states that permitted the products required them to be labeled as "mellorine" or "low-fat mellorine." Two states, however, required them to be labeled as "imitation ice cream" or "imitation ice milk." One state required the label name "frozen dessert product." Another forbade use of the term "low-fat" in the labeling for the low-fat product. *See Federal and State Standards for the Composition of Milk Products (and Certain Non-Milkfat Products)* 25 (U.S. Dept. Agriculture Handbook No. 51, 1974).

Numerous other instances of conflicting state labeling requirements may be cited. Many states, for example, require the label for a nondairy cheese substitute to bear the identity statement "imitation cheese" in prominent type. *E.g.,* Iowa Code Ann. § 191.2(3). But Arizona has established a complex system of labeling for these products that permits only "fanciful" or brand names and prohibits label references to "cheese" (except as part of the required ingredient listing). Ariz. Rev. Stat. Ann. §§ 3-626.02, 3-661 *et seq.* Arizona officials, to whom labels for such products must be submitted prior to marketing in the state, will not approve labels that bear the identity statement "imitation cheese."

The multiplicity of state statutory requirements is supplemented by a profusion of administrative regulations issued by state enforcement agencies. Like the statutes on which they are based, these regulations are often inconsistent from state to state. They present a further difficulty to manufacturers because they are often unavailable in authoritative, up-to-date

compilations. Some states (like California) maintain codes of administrative regulations that are more or less current. But many others have no reliable method of disseminating their regulatory issuances. The Public Administration Service, which sought to compile state food and drug regulations over a period of 18 months, concluded that "[i]n some agencies, field work was completed with more than the suspicion that agency filing and other administrative practices were such that no real assurance existed that current regulations had been fully brought together." Public Administration Service, *A Study of State and Local Food and Drug Programs* 65 (1965). This uncertainty concerning state and local food labeling requirements is a serious obstacle to national food distribution. The conscientious national marketer often cannot authoritatively determine whether the labeling for its products is lawful in all jurisdictions. In contrast, federal regulations are readily available to manufacturers through the Federal Register system and the annual issuances of the Code of Federal Regulations.

The additional costs imposed by differing food label requirements, all of which must be borne by consumers in the form of higher food prices, are literally incalculable. To the extent that two or more jurisdictions require different labels, there are of course the direct costs of printing up the additional labels. But the indirect costs—maintaining two or more separate label inventories, imposing separate distribution and record-keeping requirements, and the necessity for entirely different advertising, to name just a few —are far greater. Each minor label change in the future in turn means, as a practical matter, multiple

changes in all of the labels required to be used in each of the various jurisdictions involved. Thus, consumers are paying millions of dollars each year, in the form of higher food prices, as the direct and immediate result of these differing food label requirements.

Nor is there any conceivable consumer benefit that results. At present, every two-pound bag of flour sold in the United States contains the same quantity of flour solids, standardized to the nationwide 15 percent moisture level promulgated by the Food and Drug Administration. Of what possible benefit can it be to consumers if California is permitted to adopt a different rule which requires different manufacturers either substantially to overpack all of the flour they sell in California, or to overpack all of their flour sold in the country (which will make them non-competitive with those local California flour packers who need not overpack in order to meet the California requirements)? How are consumers protected by requiring different names for a food in different states, or banning a food completely from one state in order to protect the local agricultural industry? It is obvious that these are simply distinctions without a difference, imposed for purposes wholly unrelated to the public welfare.

It is undoubtedly true that any of a number of different ways of determining the net contents of a product, or the common or usual name of a food, or the label placement of mandatory information, or similar matters, could be determined to be reasonable, in the abstract. This is not sufficient reason, however, for ten different jurisdictions to adopt ten different requirements in the face of a definitive federal determi-

nation of proper labeling practices under the Federal Food, Drug, and Cosmetic Act.

This Court has recognized the importance of assuring that inconsistent state food laws do not burden legitimate interstate commerce in foods or diminish the rights created under federal law. In *McDermott* v. *Wisconsin,* 228 U.S. 115, 133-134 (1913), the Court denied to the states the power to ". . . discredit and burden legitimate Federal regulations of interstate commerce . . ." or ". . . to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper . . . ." In *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1942), the Court upheld the preemptive effect of a federal statutory scheme governing the production of renovated butter. The Court said:

> "It is said that the state and the United States have worked cooperatively in protecting consumers from vicious practices in the handling of processed butter; that any action by the state aids the policy of both in disposing of unfit food; and that therefore a harmonious federal-state relationship should not be hampered. . . . Nothing could be more fertile for discord, however, than a failure to define the boundaries of authority. Clashes may and should be minimized by mutual tolerance; but they are much less likely to happen when each knows the limits of its responsibility. And, it is only reasonable to assume that the theory of denying inconsistent powers to a state is based largely upon the benefits to the regulated industry of freedom from inconsistencies." 315 U.S. at 169.[8]

[8] In cases arising under the Commerce Clause, this Court has also recognized the unreasonable burden on interstate commerce that may result from inconsistent state requirements. In Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), for example, the Court confronted an Arizona statute limiting the length of trains passing through the state. The purpose of the statute was to reduce accidents. The Court invalidated the statute and stated:

> "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it. . . . The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having nation-wide authority are apparent." 325 U.S. at 775.

By its nature, the regulation of interstate marketing of food demands a single uniform system of rules established by the federal government.[9]

B. The Federal Food, Drug, and Cosmetic Act and Regulations Issued under It Establish a Pervasive System of Federal Regulation That Leaves No Room for Supplementary Regulation by the States.

This Court has often recognized that the existence of a pervasive system of federal regulation may evidence an intent to preempt the adoption of supplementary regulations by the states. *E.g., City of Bur-*

[9] This Court has recently recognized that "it is implicit in the regulatory scheme, not spelled out *in haec verba,*" that FDA is an "expert agency" endowed by Congress with "primary jurisdiction" over the "technical and scientific" matters involved in administration of the Act because they are within its "peculiar expertise." This recognition was in large part based upon the Court's determination that a contrary decision "would seriously impair FDA's ability to discharge the responsibilities placed upon it by Congress." Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 627 (1973); CIBA Corp v. Weinberger, 412 U.S. 640, 643-644 (1973); Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 653-654 (1973). FDA's role as the expert agency primarily responsible for the resolution of questions within its jurisdiction cannot be carried out if other agencies, at the federal or state level, are permitted to second-guess the policy decisions it makes.

bank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Pennsylvania* v. *Nelson*, 350 U.S. 497, 502-504 (1956); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241-244 (1959). The Federal Food, Drug, and Cosmetic Act and the regulations issued under it establish such a system.

Early federal statutes concerning food labeling and marketing were directed to particular practices and abuses. Statutes enacted in the 1880's and 1890's (often in the form of restrictive revenue measures), for example, regulated the labeling and composition of substitute or imitation foods, such as oleomargarine [10] and filled cheese,[11] that could be palmed off as traditional foodstuffs.

The first general statute—the Food and Drugs Act of 1906 [12]—established an essentially "negative" regulatory scheme. It prohibited various forms of adulteration and misbranding, but it required few affirmative disclosures and left regulatory officials little authority to establish such requirements through regulations. The 1906 Act, for example, did not require complete ingredient listings for most foods. *See Savage* v. *Jones*, 225 U.S. 501 (1912). The Secretary of Agriculture had no authority to establish standards of identity for foods or to fix the minimum quantity or quality of ingredients expected by consumers.

The 1938 Act represented a major shift in emphasis from the 1906 Act. The Commissioner of Food explained this shift during the 1935 House hearings on the legislation:

[10] Act of Aug. 2, 1886, ch. 840, 24 Stat. 209.

[11] Act of June 6, 1896, ch. 337, 29 Stat. 253.

[12] Act of June 30, 1906, ch. 3915, 34 Stat. 768.

"... The misbranding provisions of the [Food and Drugs Act of 1906] ... are wholly negative in character; with the exception of the affirmative requirement that food in package form bear declaration of the net content, the misbranding provisions are in the nature of 'don't.' They say you must not make a statement that is false or misleading, but they do not require you to make affirmatively a statement that is informing.

"The rule of caveat emptor applies. You can remain silent in every language of the universe. But if you do make a statement, the law requires it to be a truthful statement. A horse-trader's code would provide that much.

"While that is entirely satisfactory so far as the negative misbranding provisions go—and we have sought to retain those provisions in S. 5, the Copeland bill—it is not sufficient to give to the consumer the information that the consumer is entitled to have about foods of the types and of the kinds that are to be found upon the market at the present time.

"So this bill, as I will undertake to point out with some particularity as we go through it, does offer requirements for affirmative labeling which will make possible the purchase more intelligently and therefore more discriminatingly of food and drug products." Hearing Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 6906, H.R. 8805, H.R. 8941, and S. 5, 74th Cong., 1st Sess. 44-45 (1935).

This purpose has, indeed, been achieved. Beginning in 1938, FDA has established numerous labeling requirements for all food products marketed in commerce.

In recognition of its congressional mandate to establish a nationwide food labeling policy, FDA announced in January 1973 "the most significant change in food labeling practices since food labeling began."[13] In the Federal Registers of January 19,[14] March 14,[15] August 2, 1973,[16] and June 14, 1974,[17] alone it issued a total of 143 pages of proposed and final food labeling requirements and explanatory information. Other requirements have since been published.

It is not feasible to list all of the current food labeling requirements promulgated by FDA. They comprise some 278 pages in the 1976 edition of the Code of Federal Regulations, and blanket all aspects of the labeling of food products shipped in commerce today. These requirements include:

1. Procedures for requesting variations and exemptions from required label statements. 21 C.F.R. § 1.1a.

2. Definitions of the term "package" and general rules governing the placement and conspicuousness of mandatory label information. 21 C.F.R. § 1.1b.

3. Specific exemptions from required label statements. 21 C.F.R. § 1.1c.

4. Rules governing "cents-off" and other savings representations. 21 C.F.R. §§ 1.1d, 1.1e.

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[13] FDA Press Release 73-2 (January 17, 1973).

[14] 38 Fed. Reg. 2124-2164.

[15] 38 Fed. Reg. 6950-6974.

[16] 38 Fed. Reg. 20702-20750.

[17] 39 Fed. Reg. 20878-20908.

5. Definitions of "label" and "labeling." 21 C.F.R. § 1.2.

6. Rules governing the failure to reveal material facts in labeling. 21 C.F.R. § 1.3.

7. Definition of the term "principal display panel." 21 C.F.R. § 1.7.

8. Rules governing the form, prominence, and placement of identity statements for foods. 21 C.F.R. § 1.8.

9. Rules governing the form and conspicuousness of the label declaration of the manufacturer, packer, or distributor of a food. 21 C.F.R. § 1.8a.

10. Rules governing the placement, conspicuousness, format, and accuracy of net quantity of contents declarations. 21 C.F.R. § 1.8b.

11. Rules governing the declaration of the number of servings contained in a food package. 21 C.F.R. § 1.8c.

12. Rules establishing an information panel for the placement of required label declarations, governing the format of the panel, and setting minimum type-sizes (with exemptions and special provisions for several kinds of foods). 21 C.F.R. § 1.8d.

13. General rules governing the prominence of required label information and the languages in which it must appear. 21 C.F.R. § 1.9.

14. Rules governing the label declaration of standardized foods used as ingredients in other foods and the designation of specific kinds of foods in ingredient listings. 21 C.F.R. § 1.10.

15. Exemptions from required label statements for incidental additives, assortments of different foods,

foods repackaged in retail establishments, foods shipped in bulk from one plant to another for further processing, and certain specific kinds of foods. 21 C.F.R. § 1.10a.

16. Rules governing the label declaration of spices, flavorings, colorings, and chemical preservatives. 21 C.F.R. § 1.12.

17. Warning statements for labels for food containers. 21 C.F.R. § 1.13.

18. Rules setting forth specific representations that render foods misbranded. 21 C.F.R. § 1.15.

19. Special rules for collective label names for ingredients of animal feeds. 21 C.F.R. § 1.16.

20. Rules establishing a uniform format for nutrition labeling, setting conditions under which it is required, and establishing standards for determining its accuracy. 21 C.F.R. § 1.17.

21. Rules governing the format and content of label statements concerning the cholesterol, fat, and fatty acid content of foods. 21 C.F.R. § 1.18.

22. Statements of policy and interpretation concerning numerous specific food labeling questions, such as the labeling of margarine, the declaration of quantity of contents on labels for canned oysters, label declaration of D-erythroascorbic acid, label statements for salt and iodized salt, and labeling of kosher and kosher-style foods. 21 C.F.R. Part 3.

23. Standards of quality and required label statements for certain foods. 21 C.F.R. Part 11.

24. Definitions and standards of identity for foods, comprising 24 broad varieties of food. 21 C.F.R. Parts 14–80.

25. Nutritional quality guidelines for foods, including required label statements. 21 C.F.R. Part 100.

26. General principles governing common or usual names for foods not subject to standards of identity, including rules governing the format and typesize of identity statements and the declaration of the percentage by weight of certain ingredients and regulations establishing common or usual names for certain specific foods or classes of foods. 21 C.F.R. Part 102.

27. Rules governing label statements for special dietary foods, including foods for infant use, vitamins and minerals, foods for control of body weight or management of disease, and hypoallergenic foods. 21 C.F.R. Part 125.

One can appreciate the detail of the FDA regulations only by reading them. They establish a comprehensive and interrelated system of rules that affects every aspect of the labeling and composition of food. It is inconceivable that a state can pick and choose among the rules that make up this pervasive federal scheme, or formulate different approaches to one or another of the many problems they address, without interfering with the purpose of federal law.

The FDA regulations have, moreover, been developed in accordance with the procedural safeguards guaranteed by the Administrative Procedure Act, 5 U.S.C. §§ 551–706, which assure public participation. Although the Grocery Manufacturers of America has not always agreed with these regulations, it has recognized that the FDA has made a major attempt to harmonize its various food labeling requirements, to establish a consistent rationale that will be applied to all such requirements, and to approach food labeling on a sys-

tematic, rather than ad hoc, basis. This is in substantial contrast to state food labeling requirements, which can be adopted quickly by local jurisdictions without national public notice or regard for the requirements of other jurisdictions.

The pervasiveness of the federal system governing food labeling leaves no room for supplementation by state requirements. State requirements different from or in addition to those imposed under federal law must be declared invalid.

C. Decisions Concerning the Preemptive Effect of the Food and Drugs Act of 1906 Were Based on the Limited Jurisdictional Provisions and the Narrow Coverage of That Act and Do Not Determine the Preemptive Effect of the Federal Food, Drug, and Cosmetic Act of 1938.

Several decisions of this Court under the Food and Drugs Act of 1906 upheld state regulations imposing on foods held for sale within their jurisdictions requirements different from or in addition to those imposed by the federal government. With but one exception, however, those decisions were governed by legal considerations that are irrelevant to the determination whether the Federal Food, Drug, and Cosmetic Act of 1938 preempts state laws that purport to impose labeling requirements different from or in addition to those imposed under the federal law.

In several of the decisions, the Court upheld state requirements that applied only to foods held for retail sale and not contained in original unbroken packages that had been shipped in interstate commerce. *Hebe Co.* v. *Shaw,* 248 U.S. 297 (1919); *Weigle* v. *Curtice Brothers Co.,* 248 U.S. 285 (1919); *Armour & Co.* v. *North Dakota,* 240 U.S. 510 (1916); *Price* v.

Illinois, 238 U.S. 446 (1915). These decisions were based in part on the jurisdictional provisions of the 1906 Act (which reached only goods that remained "unloaded, unsold, or in original unbroken packages" after interstate shipment[18]) and on the limited concept of the Commerce power from which those provisions were derived. *See Brown* v. *Maryland,* 12 Wheat. (25 U.S.) 419 (1827); *United States* v. *Great Atlantic & Pacific Tea Co.,* 92 F.2d 610 (1937). That jurisdictional limitation was eliminated in the 1938 Act.

Two of this Court's decisions were based on the limited scope and coverage of the substantive provisions of the 1906 Act. *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427 (1919); *Savage* v. *Jones,* 225 U.S. 501 (1912). In *Savage,* a state statute required ingredient listings to appear on the labels of animal feeds sold within the state. In *Corn Products,* a special state regulation required a blend of corn syrup, molasses, and sorghum to bear a label declaring the percentage of each ingredient. The Food and Drugs Act of 1906 prohibited false or misleading label statements, but it did not require ingredient declarations (except for certain specified ingredients, such as morphine, cocaine, and opium). In both cases, the Court concluded that the federal regulatory scheme did not "cover the entire ground." 249 U.S. at 427, 225 U.S. at 532. As the Court said in *Savage* v. *Jones:*

> ". . . It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. . . ."

[18] Act of June 30, 1906, ch. 3915, 34 Stat. 768, sec. 10.

> "Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. . . ." 225 U.S. at 532.

In *McDermott* v. *Wisconsin,* 228 U.S. 115 (1913), the Court invalidated a state regulation that affected an aspect of food labeling that was affirmatively regulated by the 1906 Act. Both federal and state law required the food in question (a blend of corn and cane syrups) to bear an identity statement. The federal law did not specify the words to be used in such a statement. The state, however, imposed a specific form of words to be used and prohibited all others.[19] The Court's decision cannot be explained as an example of irreconcilable conflict between state and federal law, since the labeling requirement imposed by state law was also permitted under the federal statute. The Court said:

> ". . . Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject." 228 U.S. at 133–134.

[19] Section 8 of the Food and Drugs Act of 1906 provided that "mixtures" or "compounds" would not be deemed misbranded if sold under "distinctive names." Act of June 30, 1906, ch. 3915, 34 Stat. 768, sec. 8. The state statute applied to "mixtures" of certain syrups, but prescribed specific names under which they were to be sold. 228 U.S. at 125-126.

The *Savage* and *Corn Products* decisions thus rested on a determination that the 1906 Act did not "cover the entire field" of food labeling, and that states remained free to regulate those aspects of food labeling not touched on by the federal law. The *McDermott* decision recognized, however, that, as to those aspects of food labeling for which the federal statute established an affirmative regulatory scheme, it left no room for supplementary state requirements, even though they might not conflict irreconcilably with requirements imposed under federal law.

As noted above (at pp. 28–34), the 1938 Act represented a major departure from the essentially "negative" regulatory scheme adopted by the 1906 Act. The 1938 Act established the basis for a comprehensive system of federal regulations that "cover the entire ground" of food labeling. No "gaps" remain for supplementary state regulations that do not in some manner interfere with the federal system.[20]

[20] It is significant that the 1938 Act and the regulations issued under it have eliminated the "gaps" in federal regulation specifically identified in the *Savage* and *Corn Products* cases. Sections 403(g) and (i) of the Act, 21 U.S.C. §§ 343(g), (i), require food labels to bear ingredient declarations, and FDA regulations deal in minute detail with the content and format of those declarations. *E.g.*, 21 C.F.R. §§ 1.10, 1.10a, 3.88. The standard of identity for "table sirups" (which encompasses the product considered in the *Corn Products* case) requires a label declaration of the percentage of syrup ingredients under specified conditions. 21 C.F.R. § 30.1 (d)(3).

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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